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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 ASHLAND INC.,

10 Plaintiff,

11 v.

12 LEO H. LONG, JR., et al.,

13 Defendants.

CASE NO. C10-5889BHS

14 ORDER DENYING  
15 DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT  
AND PLAINTIFF'S MOTION  
FOR LEAVE TO FILE  
SURREPLY

16 This matter comes before the Court on Defendant Leo H. Long, Jr.'s ("Leo Long")  
17 motion for summary judgment (Dkt. 27) and Plaintiff Ashland Inc.'s ("Ashland") motion  
18 for leave to file a surreply (Dkt. 35). The Court has considered the pleadings filed in  
19 support of and in opposition to the motions and the remainder of the file and hereby  
20 denies Leo Long's motion for summary judgment and denies Ashland's motion for the  
21 reasons stated herein.

22 **I. PROCEDURAL HISTORY**

23 On December 7, 2010, Ashland filed a complaint against Defendants Leo Long  
24 and Thomas Long ("Defendants") for breach of contract. Dkt. 1.

25 On June 14, 2011, Leo Long filed a motion for summary judgment. Dkt. 27. On  
26 June 16, 2011, Defendant Thomas C. Long joined in Leo Long's motion. Dkt. 31. On  
27 July 5, 2011, Ashland responded. Dkt. 32. On July 8, 2011, Leo Long replied. Dkt. 34.  
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On July 21, 2011, Ashland filed a motion for leave to file a surreply. Dkt. 35.

## II. FACTUAL BACKGROUND

### A. Complaint

Ashland alleges that Defendants breached a contract with Ashland by refusing to indemnify and defend Ashland in an underlying personal injury lawsuit that was filed in the Superior Court for the State of Washington, Grays Harbor County. *See generally* Dkt. 1 (“Complaint”). The contract in question is a Purchase and Sale Agreement (“PSA”) between Ashland Technology, Inc. (“Ashland Technology”), Defendants, and Atlas Foundry & Machine Co. (“Atlas”) dated May 2, 1985. *Id.*, Exh. A (the “PSA”). Atlas was the buyer, Defendants were the guarantors, and Ashland Technology was the seller. PSA at 1. The sale involved stock and assets of Ashland’s Foundry Division (“Foundry Business”). *Id.* Ashland alleges that the “PSA conveyed Ashland Technology’s interest in the Long Foundry located in Hoquiam, Washington to Atlas.” Complaint, ¶ 7.

The PSA includes provisions regarding the assumption of liabilities, indemnification, and guaranteed performance. Ashland alleges these terms are as follows:

8. In Section 3.1(e) of the PSA, Atlas agreed to assume all claims and liabilities arising out of the operation of Ashland Technology’s Foundry Business, known or unknown, whether arising from acts, omissions or occurrences occurring before or after the Closing. *See* [PSA] at 8. On information and belief, Atlas is no longer an existing legal entity.

9. In Section 15.7 of the PSA, in recognition that [Ashland] could remain contingently liable for the same liabilities, Atlas agreed to indemnify and hold Ashland harmless from and against any and all loss, cost, damage, claim and expense, including, without limitation, attorneys fees and disbursements, arising under or in connection with any obligations or liabilities assumed by Atlas. *See* [PSA] at 38.

10. In the PSA at Section 10, Leo H. Long Jr. and Thomas C. Long unconditionally guaranteed the performance of Atlas’s obligations under the PSA and agreed to be jointly and severally liable on those obligations. *See* [PSA] at 26-27.

Complaint, ¶¶ 8-10.

1 In 2007, Judy Clauson filed a complaint for personal injuries against numerous  
2 Defendants including Ashland. *Id.*, ¶ 13 and Exh. B. Ashland alleges that Mrs. Clauson  
3 “sought damages for personal injuries allegedly suffered by Judy Clauson due to exposure  
4 to asbestos fibers brought home by her former husband while he was employed at the  
5 Long Foundry.” *Id.*, ¶ 14. Ashland alleges that Mrs. Clauson’s alleged injuries were  
6 covered by the indemnity provisions of the PSA and, therefore, Ashland sought indemnity  
7 for Atlas and a guarantee of Atlas’ performance from Defendants. *Id.*, ¶ 15. Ashland  
8 alleges that Atlas, by way of its attorney, refuses to indemnify Ashland (*id.*, ¶ 23) and that  
9 Leo Long denied responsibility to indemnify Ashland (*id.*, ¶ 22). Finally, Ashland alleges  
10 that it settled with Mrs. Clauson. *Id.* ¶ 24.

#### 11 **B. The 1985 Purchase and Sale Agreement**

12 In 1975, U.S. Filter Company purchased two separate foundries, the Long Foundry  
13 and the Atlas Foundry, in two separate transactions. The Long Foundry, located in  
14 Hoquiam, Washington, became “New Atlas 2,” a wholly owned subsidiary of U.S. Filter  
15 Company. The Atlas Foundry, located in Tacoma, Washington, became “New Atlas,” a  
16 separate wholly owned subsidiary of U.S. Filter Company. In the early 1980s, Ashland  
17 Oil or Ashland Technologies purchased U.S. Filter Company. As of its closure in 1984,  
18 Ashland Technology, Inc. operated the Long Foundry under an assigned lease.

19 In May 1985, Atlas purchased certain assets and assumed certain liabilities relating  
20 to Ashland Technology, Inc.’s foundry business by executing a PSA with Ashland  
21 Technology, Inc. Leo Long signed the PSA on behalf of Atlas as president of the  
22 company. Leo Long and his brother Thomas Long also signed the PSA as guarantors.  
23 The PSA provides that “[i]n addition to any other liabilities, the party committing [a]  
24 breach shall be liable to the other party with respect to all expenses incurred by such other  
25 party in connection with this Agreement.” PSA, ¶ 15.1. With regard to the parties in  
26 interest, the PSA provides as follows:  
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1 This Agreement shall be binding upon and inure to the benefit of the parties  
2 hereto and their respective successors and assigns but shall not be  
3 assignable by any party without the written consent of the other parties.  
4 Nothing in this Agreement, whether express or implied, is intended or shall  
5 be construed to confer upon any person other than the parties hereto any  
6 right, remedy or claim under or by reason of this Agreement, nor is  
7 anything in this Agreement intended to relieve or discharge the obligation  
8 or liability of any third party to this Agreement, nor shall any provision give  
9 any third persons any rights of subrogation or action over against any party  
10 to this Agreement.

11 *Id.* ¶ 15.3.

### 12 **C. The Origins of AmeriCast**

13 Shortly after the PSA, Leo Long bought out Thomas Long and managed Atlas  
14 until 1989. In 1989, Atlas was sold to an entity owned by TIC United Corporation  
15 (“TIC”). That entity subsequently became Atlas Foundry & Machine Company, a  
16 division of TIC. TIC entered bankruptcy proceedings in 2000. Atlas Foundry & Machine  
17 Company continued to operate during the pendency of the bankruptcy proceeding. In  
18 2002, pursuant to a purchase and sale agreement, TIC transferred its Atlas assets and  
19 certain liabilities to Atlas Foundry, LLP. AmeriCast Technologies, Inc. is the successor-  
20 in-interest to Atlas Foundry, LLP.

### 21 **D. The Clauson Suit**

22 On or about May 3, 2007, the Clausons initiated an action (“the Clauson suit”)  
23 against Atlas Foundry Limited Partnership, Atlas Castings & Technology, and AmeriCast  
24 Technologies, Inc. (collectively, “AmeriCast”) and Ashland in Grays Harbor County  
25 Superior Court. On May 15, 2007, the Clausons filed their first amended complaint in  
26 which they alleged that Judy Clauson’s former husband, Clifford Eberwein (“Eberwein”),  
27 worked at the Long Foundry between 1979 and 1984. The amended complaint further  
28 alleged that Eberwein was exposed to asbestos fibers during such employment, and that  
Judy Clauson contracted mesothelioma after years of living with Eberwein. The

1 Clausons alleged that AmeriCast was liable for the Clausons' damages on the sole basis  
2 that AmeriCast was the successor-in-interest to the Long Foundry.

3 On September 5, 2007, the Clausons filed a second amended complaint wherein  
4 they continued to allege that AmeriCast was liable for the Clausons' damages because it  
5 was a successor-in-interest to the Long Foundry. On December 20, 2007, AmeriCast  
6 moved for summary judgment on the basis that AmeriCast was not a successor-in-interest  
7 to the Long Foundry. Ashland filed a brief opposing the motion and argued as follows:

8 Plaintiffs claim that Ashland is a successor to ATEC/"Long  
9 Foundry." *See* Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs'  
10 Motion for Partial Summary Judgment has substantial gaps regarding the  
11 corporate structure and subsequent mergers and acquisitions with respect to  
12 ATEC's relationship to the Long Foundry. *Id.* Ashland and ATEC never  
13 merged, and ATEC was always a wholly owned subsidiary of Ashland. *See*  
Statement of Undisputed Facts, ¶¶ 11-13. Therefore, **Ashland is not a  
successor to ATEC/the "Long Foundry," because ATEC and Ashland  
always remained two distinct corporate entities up to and including  
ATEC's dissolution.**

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15 ATEC did not merge with Ashland, rather it was dissolved according  
16 to Section 103 of the Delaware General Corporation Law. Pursuant to  
17 Section 103, a certificate of dissolution is effective when the instrument is  
18 signed by an authorized officer of the corporation, all fees and taxes are  
19 accounted for, and the instrument is filed with the Secretary of State. 8  
20 Del.C. 1953, § 103. Per Section 103(d), the instrument becomes effective  
21 upon its filing date. 8 Del.C. 1953, § 103(d). ATEC's certificate of  
22 dissolution was filed with the Delaware Secretary of State on September 27,  
23 2001 (after having been authorized by all stockholders on September 30,  
24 2000). *See* Statement of Undisputed Facts, ¶¶ 21-22. Thus, on September  
25 27, 2001, ATEC ceased to exist as a legal entity. *Id.* Once a certificate of  
26 dissolution becomes effective in accordance with Section 103, the  
27 corporation is dissolved. 8 Del.C. 1953, § 275(f). Since ATEC's certificate  
28 of dissolution was in compliance with Section 103, its dissolution became  
effective on September 27, 2001. Ashland was never responsible for  
ATEC's former assets and liabilities under Delaware Law because of  
ATEC's status as a wholly owned subsidiary of Ashland. Therefore,  
**Ashland is not a successor to ATEC/ "Long Foundry," because ATEC  
and Ashland always remained two distinct corporate entities up to and  
including ATEC's dissolution.**

Dkt. 33, Declaration of David A. Shaw, Exh. C at 11-12 (emphasis added).

The Court granted the Clausons' motion for summary judgment and specifically  
held that "Ashland, Inc. is not the successor in interest to ATEC, Inc." *Id.*, Exh. E at 2.

### III. DISCUSSION

#### A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 253). Conclusory,

1 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
2 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

### 3 **B. Defendants' Motion**

4 Defendants move for summary judgment based on the provision of the PSA that  
5 covers the assignment of the parties' rights. Specifically, Defendants contend that they  
6 "never authorized the assignment of the interests of Ashland Technology, Inc. to Ashland  
7 Inc., as was required by the [PSA] in order for Ashland Inc. to enforce Ashland  
8 Technology, Inc.'s rights under the PSA." Dkt. 27 at 1. Ashland contends that (1) the  
9 PSA does not require Defendants' authorization for the transfer of rights to a successor,  
10 (2) the rights were transferred through equitable subrogation; and (3) the right to  
11 indemnity was transferred through the doctrine of *de facto* merger. Dkt. 32 at 1-2.

12 Ashland argues that the PSA required consent only for an assignment of rights  
13 under the PSA and did not require consent "for the assumption of rights by a successor."  
14 Dkt. 32 at 6. Defendants counter that, based on Ashland's positions in the Clauson  
15 matter, Ashland should be judicially estopped from asserting the argument that it is a  
16 successor of Ashland Technology. Dkt. 34 at 3-6.

17 "Judicial estoppel, sometimes also known as the doctrine of preclusion of  
18 inconsistent positions, precludes a party from gaining an advantage by taking one  
19 position, and then seeking a second advantage by taking an incompatible position."  
20 *Rissetto v. Plumbers and Steamfitters*, 94 F.3d 597, 600 (9th Cir. 1996). The doctrine of  
21 judicial estoppel is an equitable doctrine that may be invoked by the court at its discretion  
22 to protect the integrity of the judicial process. *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th  
23 Cir. 1990). The doctrine has been applied to statements made in separate proceedings.  
24 *Rissetto* 94 F.3d at 605.

25 The Court may consider a number of factors in determining whether the doctrine  
26 of judicial estoppel applies. The Supreme Court has described this inquiry as follows:  
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1 several factors typically inform the decision whether to apply the doctrine  
2 in a particular case: First, a party's later position must be "clearly  
3 inconsistent" with its earlier position. Second, courts regularly inquire  
4 whether the party has succeeded in persuading a court to accept that party's  
5 earlier position, so that judicial acceptance of an inconsistent position in a  
6 later proceeding would create "the perception that either the first or the  
7 second court was misled." A third consideration is whether the party  
8 seeking to assert an inconsistent position would derive an unfair advantage  
9 or impose an unfair detriment on the opposing party if not estopped.

10 *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotations and citations  
11 omitted).

12 In this case, the Court declines to exercise its discretion and grant the equitable  
13 doctrine of judicial estoppel. Although Ashland's current position is clearly inconsistent  
14 with its prior position and Ashland succeeded in persuading the state court of its prior  
15 position, Ashland would not derive an unfair advantage and Defendants would not be  
16 burdened with an unfair detriment if the Court considered Ashland's current position.  
17 Defendants' only argument in support of this third factor of judicial estoppel is that  
18 Ashland "seeks to avoid the language in the PSA that would bar Ashland Inc. from  
19 enforcing Ashland Technology's rights under the PSA" Dkt. 34 at 6. The Court is not  
20 convinced that the enforcement of contract rights, if they do exist, is an unfair advantage.  
21 Moreover, Ashland's inconsistent positions do not question the integrity of the judicial  
22 system as intervening facts (the state court decisions and Ashland's decision to settle the  
23 Clauson matter) provide a plausible explanation for its current position. Ashland asserts  
24 its current position while pursuing indemnification for settling an underlying asbestos  
25 personal injury action as opposed to the situation where a party should be judicially  
26 estopped from seeking double recovery under inconsistent theories. *See, e.g., Rissetto*, 94  
27 F.3d at 606 ("Plaintiff cannot be permitted to recover money twice on these inconsistent  
28 positions."). Therefore, the Court declines to find that Ashland should be judicially  
estopped from arguing that it is a successor to Ashland Technology. This finding does  
not address whether Ashland is legally a successor to Ashland Technology.

1 Defendants argue that, even if Ashland is a successor, the second sentence of  
2 paragraph 15.3 of the PSA provides that “only the parties to the PSA have rights,  
3 remedies, or claims under the PSA.” Dkt. 34 at 3. Defendants, however, have failed to  
4 show, at this time, that this sentence of the PSA precludes successors in interest from  
5 pursuing the indemnification rights of a party to the PSA. In other words, Defendants have  
6 failed to show that, as a matter of law, their proposed interpretation of paragraph 15.3  
7 (Dkt. 34 at 3:1-12) is the only plausible interpretation of this contract provision.  
8 Therefore, Defendants have failed to carry their burden, at this time, by showing that they  
9 are entitled to judgment as a matter of law and the Court denies their motion.

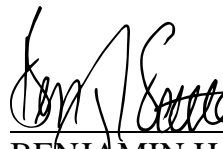
10 **C. Ashland’s Surreply**

11 A party may file a surreply to strike material in a reply brief. Local Civil Rule  
12 7(g). In this case, Ashland requests permission to file a surreply to respond to arguments  
13 that Leo Long presented in his reply brief. Dkt. 35 at 1. Ashland’s surreply is improper  
14 under the local rules. Therefore, the Court denies Ashland’s motion.

15 **IV. ORDER**

16 Therefore, it is hereby **ORDERED** that Leo Long’s motion for summary judgment  
17 (Dkt. 27) and Ashland motion for leave to file a surreply (Dkt. 35) are **DENIED**.

18 DATED this 11th day of August, 2011.

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22 BENJAMIN H. SETTLE  
23 United States District Judge  
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